

Chuck

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE)	
APPLICATION FOR BENEFICIAL)	PROPOSAL
USE PERMIT 41I-100284 BY)	FOR
UDELL SHARP)	DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on March 5, 1999, in Helena, Montana, to determine whether a beneficial water use permit should be issued to Udell Sharp (Applicant) for the above application under the criteria set forth in Mont. Code Ann. § 85-2-311 (1) and (5) (1997).

APPEARANCES

Applicant appeared at the hearing in person and by and through counsel, James Madden. Bruce Siegmund, Project Hydrologist, appeared at the hearing and testified for Applicant.

Objector Dan Edens appeared at the hearing in person and by and through counsel, Holly Jo Franz. Vivian Drake appeared at the hearing and testified for Objector Dan Edens. Objectors Jeff Lovely, Monte Brown, and Vernon Paronto appeared at the hearing and testified on their own behalf.

Jim Beck, Civil Engineering Specialist with the Helena Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing and was

Proposal for Decision
Application 41I-100284 by Udell Sharp

Page 1

CASE # 100284

called to testify by the Applicant.

EXHIBITS

Applicant offered three exhibits for the record. All were accepted without objection.

Applicant's Exhibit 1 is a copy of Attachment A to Udell Sharp's Amended Application for Beneficial Water Use Permit.

Applicant's Exhibit 2 is an Eight Hour Pump Log.

Applicant's Exhibit 3 is a map showing the general area of objectors' wells, the location of the domestic well used for the eight-hour pump test, the location of Applicant's irrigation well and Tenmile Creek.

Objector Edens offered two exhibits for the record. Both were accepted without objection.

Objector Edens' Exhibit A consists of 33 pages which are excerpts from *Montana Ground-Water Atlas* produced by Montana Natural Resource Information System; *Hydrology of the Helena Valley-Fill Aquifer System, West-Central Montana* produced by the U.S. Geological Survey as Water-Resources Investigation Report 92-4023; and *Evaluation of Shallow Aquifers in the Helena Valley, Lewis and Clark County, Montana* by Joe A. Moreland and Robert Leonard and produced by U.S. Geological Survey as Water-Resources Investigation Open-file Report 80-1102.

Objector Edens' Exhibit B is a map upon which Mr. Edens has shown the location of the point of diversion of his two water rights with the priority dates, the location of his ditch, two

springs, and two parcels of land.

On February 16, 2000, the record was reopened to take information and allow cross-examination of Applicant and his witnesses concerning the aquifer test. At that time both Objector Edens and Applicant each offered two exhibits for the record.

Objector Edens' Exhibit O-1 is a two-page memorandum from Jim Beck to Terri McLaughlin, dated November 23, 1999, detailing their concerns on the aquifer test by Applicant. This exhibit was accepted without objection.

Objector Edens' Exhibit O-2 is a four-page letter dated January 4, 2000, to Mr. Dan Edens from Vivian Drake discussing the aquifer test. Applicant objected to this letter becoming a part of the record on the basis that he had not received it until 4:00 p.m. two days before the reopening hearing and had no time to prepare; further, he had a standing objection to Mrs. Drake's testimony on any part of the letter. This objection was taken under advisement by the Hearing Examiner. In order to have a fair and impartial hearing, all evidence must be considered; therefore, the objection is overruled.

Applicant's Exhibit A is a two-page letter dated June 3, 1999, to Steven T. Wade from Jim Beck. This exhibit was accepted into the record without objection.

Applicant's Exhibit B consists of 37 pages which are the handwritten logs kept during the pump test. They are

measurements taken before the test began and measurements of the drawdown in the first sandpoint, the second sandpoint, the Lovely well, the Clover well, and a well constructed by the U.S.G.S., during the pump test. It also contains records of the volume meter on the new well during the test. The last 18 pages are static water levels taken from July through September and the depth of water in Tenmile Creek from July 9 through October 1, 1999. This exhibit was accepted into the record without objection.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 41I-100284 in the name of and signed by Udell Sharp was received in the Helena Water Resources Regional Office on March 14, 1997 at 10:10 a.m. (Department file.)

2. Pertinent portions of the application were published in the *Independent Record*, a newspaper of general circulation in the area of the source, September 10, 1997. Additionally, the Department served notice on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. Ten timely objections were received by the Department against this application. Applicant was notified of the objections by a letter from the Department dated October 8, 1997. (Department file.)

3. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.

4. Applicant proposes to appropriate 400 gallons per minute up to 160 acre-feet of groundwater at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, Township 10 North, Range 03 West, Lewis and Clark County, Montana, by means of a well and pump. The proposed period of diversion and use is from April 1 through September 30, inclusive of each year. The proposed purpose of use is sprinkler irrigation on 39 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 5.

5. The proposed use of water, irrigation, is a beneficial water use. Mont. Code Ann. § 85-2-102(2)(a) (1997). Applicant would benefit from the water use by increased hay production from the acreage he proposes to irrigate. The amount of water requested is reasonable, considering the soils, for the proposed purpose. (Department file.)

6. Applicant has proven by a preponderance of evidence there is water physically and legally available at the proposed point of diversion in the amount Applicant seeks to appropriate and that water can reasonably be considered legally available during the period in which Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department.

The well is 166 feet deep. In this particular area, the aquifer is divided by a clay and silt layer at 80 to 94 feet.

The clay and silt deposit most likely is not continuous throughout the aquifer; however, in this area it appears to separate the water above 94 feet from the effects of pumping from the deeper area. The well casing is not perforated above the 80 feet level. The casing is perforated at 94 to 108 feet, 116 to 140 feet, and from 150 to 160 feet. At the time this well was drilled, an eight-hour pump test was performed. Before the pump test began, the static water level in the new well was five feet and one inch. After pumping at 400 gallons per minute for nine hours, the drawdown was 19 feet and one inch. During this test, three nearby wells were monitored. There was no drawdown in these observation wells. When the pumping ceased, the static water level in the pumped well returned to five feet and one inch after 24 hours.

On July 6, 1999, the Department issued an interim permit to allow Applicant to appropriate water for irrigating the proposed acreage. One of the conditions of the interim permit required a 24-hour aquifer test to be performed and set forth the requirements for the test. On September 12, 1999, the test was performed. Five wells were monitored. Tenmile Creek was dry at the time of the test. The drawdown in all the wells was insignificant or did not occur at all. The water level in the Lovely well did not change. The water level in the USGS piezometer rose .12 feet. The water level in the Clover house well rose .05 feet. Although the water level in the first sandpoint continued to decline after the test was completed it is

an insignificant amount and the water level in this sandpoint had been declining more rapidly than the other wells monitored since July. (Applicant's Exhibit B, testimony of Bruce Siegmund, and Department file.)

7. Applicant has proven by a preponderance of evidence the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. It appears from the test there would be no adverse effect to other water users; however, if at any time it becomes apparent this appropriation is adversely affecting a prior right, Applicant could simply shut off the pump to cease diverting. Because this is an area of controversy, Applicant has agreed to install an in-line flow meter that records the flow rate and volume of all water diverted. Applicant has read and has agreed to Condition as written in the Proposed Order. (Department file and testimony of Applicant and Bruce Siegmund.)

8. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. The well was drilled and the pump installed by Lindsay Drilling, a licensed well driller in the State of Montana. The water would be conveyed by a six-inch main line feeding two quarter-mile wheel lines which would be operated simultaneously. (Department file and testimony of Applicant and Bruce Siegmund.)

9. The proposed water use is in the Upper Missouri Basin

closure area which includes the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, Township 10 North, Range 03 West, Lewis and Clark County, Montana. No new consumptive water use permits may be issued in the closure area. Exceptions to the closure include permits for groundwater. (Department records and file.)

10. Applicant has proven by a preponderance of evidence he has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Applicant owns the property where the water will be put to beneficial use. (Department file.)

11. No objections relative to water quality were filed against this application nor were objections filed relative to the ability of a discharge permit holder to satisfy effluent limitations of that permit. (Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. § 85-2-307 (1997).

2. Applicant has met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 11. Mont. Code Ann. § 85-2-311 (1997).

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit is granted to Udell Sharp to appropriate 400 gallons per minute up to 160 acre-feet of groundwater at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, Township 10 North, Range 03 West, Lewis and Clark County, Montana, by means of a well and pump. The permitted period of diversion and use is from April 1 through September 30, inclusive of each year. The permitted purpose of use is sprinkler irrigation on 39 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 5.

A. The appropriator shall install an inline flow meter approved by the regional manager at a point in the delivery line approved by the regional office to record the flow rate and volume of the water diverted. Water must not be diverted until the required measuring device is in place and operating. The appropriator shall take static water level measurements monthly during the irrigation season. If the source is a flowing well, the appropriator shall install a pressure monitoring device approved by the regional manager to measure hydrostatic pressure of the aquifer. Static water level shall be recorded only at a time when the water level is static. On a form provided by the Department, the appropriator shall keep monthly written record of the flow rate, volume, and static water level measurements and

shall submit the records by November 30 of each year. The regional manager may also request measurement records at other times during the year. Failure to submit reports may be cause for revocation or modification of a permit or change. The records must be sent to the Water Resources Regional Office at 21 N. Last Chance Gulch, PO Box 201601, Helena MT 59620-1601. PH: 406-449-0944. FAX: 406-442-9315

The appropriator shall maintain the measuring device so it always operates properly and measures flow rate accurately.

B. The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

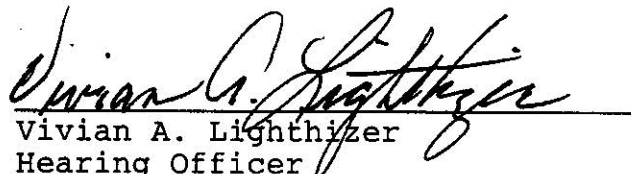
C. If at any time after this right is issued, a written complaint is received by the department alleging that diverting from this source is adversely affecting a prior water right, the department may make a field investigation of the project. If during the field investigation the department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the appropriator to show cause why the right should not be modified or revoked. The department may then modify or revoke this right to protect existing rights or leave this right unchanged if the hearing officer determines no existing water rights are being adversely affected.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 10th day of July, 2000.


Vivian A. Lighthizer
Hearing Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Notice of Hearing on Report was served upon all parties listed below on this 11th day of July, 2000.

UDELL SHARP
1378 CLOVER RD
HELENA MT 59602-7044

JAMES MADDEN
STEVEN T. WADE
BROWNING, KALECZYC, BERRY,
& HOVEN, P.C.
139 N. LAST CHANCE GULCH
PO BOX 1697
HELENA MT 59601

CHARLES J. WIRTH
1355 MILL RD
HELENA MT 59602

JEFFREY M. LOVELY
1375 MILL RD
HELENA MT 59602

DANIEL R. EDENS
1825 E SIERRA RD
HELENA MT 59602

HOLLY JO FRANZ
GOUGH, SHANAHAN, JOHNSON
& WATERMAN
33 SOUTH LAST CHANCE GULCH
PO BOX 1715
HELENA MT 59624-1715

BILL & KATHY SAMPSON
905 FORESTVALE
HELENA, MT 59601

LARRY FRIDERES
4745 N MONTANA AVE
HELENA, MT 59602

VERNON I. PARONTO
4995 N MONTANA AVE
HELENA, MT 59602

ARTHUR C. APPLIN
4927 N MONTANA AVE
HELENA, MT 59602

MONTE & MIKE BROWN
1315 MILL RD
HELENA, MT 59602

GALE JEROME
1320 CLOVER RD
HELENA, MT 59602

MITCHELL A. LOVELY
1365 MILL RD
HELENA, MT 59602-7079

NANCY ANDERSEN, CHIEF
WATER RIGHTS BUREAU
DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
P.O. BOX 201601
HELENA, MT 59620-1601
(HAND DELIVERED)

TERRI MCLAUGHLIN, MANAGER
JIM BECK, CES
HELENA REGIONAL OFFICE
48 N. LAST CHANCE GULCH
HELENA, MT 59620-1601
(ELECTRONIC MAIL)


Jennifer Hensley
Hearings Assistant